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Re Puan Sri Mona Kishu Thiratrai @ Mona Kishenchand; ex p Affin Bank Bhd

B HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D8–29–3378 OF 2004
KANG HWEE GEE J
23 JANUARY 2007

C *Bankruptcy — Adjudication and receiving orders — Dispute as to sum owed — Whether SAR must take further step of enquiring if the debtor had properties or compensation could be offered — Bankruptcy Rules 1969 r 117*

D *Bankruptcy — Petition — Validity of creditor's petition — Whether necessary to provide any additional proof of debt at the hearing of the petition — Whether affidavit verifying the petition should be annexed with the creditor's petition*

E This was an appeal by the judgment debtor against the decision of the senior assistant registrar ('SAR') in making a receiving order ('RO') and adjudication order ('AO') against her on 15 September 2006. The receiving order and adjudication order arose from a judgment debt obtained by the judgment creditor from the High Court Kuala Lumpur and pursuant to a judgment notice issued by the judgment creditor. The grounds of appeal were firstly, the debt was not proved at the hearing of the F petition before the SAR. The judgment debtor who had served a notice under r 117 of the Bankruptcy Rules 1969 ('the Rules') disputed the debt and the act of bankruptcy; secondly, the adjudication order should not have been made immediately after the receiving order was made. The SAR must take a further step of enquiring if the debtor had properties or compensation that could be offered. G The judgment creditor opposed on the ground that it was not necessary to provide any additional proof of debt at the hearing of the petition before the SAR as s 6(2) Bankruptcy Act 1967 ('the Act') merely said that at the hearing there should be proof of the debt as opposed to proof of debt at the date of hearing.

H

Held, dismissing the appeal with costs:

(1) It was incumbent upon the SAR to require proof of debt owed and the act of bankruptcy. This was set up clearly in s 6 of the Act (see para 7).

I (2) It was pertinent to note that under sub-s 6(5) of the Act, if the debtor appeared at the petition, he was required to deny the indebtedness before the SAR could act to stay all proceedings for such time as may be required for trial of the question relating to the debt. Here all the judgment debtor did was to submit the notice under r 117 of the rules to oppose the creditor's petition by stating therein that she disputed the debt and the act of bankruptcy without

condescending to any particulars. A judgment of the court for all intent and purposes was conclusive of the debt owed to the judgment creditor. It followed that in the absence of any evidence that those sums were not owed the SAR was entitled not to stay the proceedings under s 6(5) (see para 8).

(3) The judge accepted the submission by counsel for the judgment creditor that the proof of debt had been provided by the bankruptcy notice itself which alluded to the judgment obtained from the court (see para 10).

(4) With respect to the fact that the affidavit verifying the petition should be annexed with the creditor's petition, the judge disagreed with the judgment of Edgar Joseph Jr J in *Ooi Thean Chuan v Banque Nationals de Paris* [1992] 2 MLJ 526. It is the substance not the form that matters. The purpose of Form 11 was merely to bring to the notice of the judgment debtor that the verifying affidavit had been annexed to the petition. If indeed the verifying affidavit and the petition had been brought to the notice of the judgment debtor that purpose had been achieved. A minor infraction (even if proven) does not in this case make the petition ineffective and bad (see para 11).

[Bahasa Malaysia summary

Ini adalah rayuan oleh penghutang penghakiman terhadap keputusan penolong kanan pendaftar ('PKP') dalam memberikan perintah penerimaan ('PT') dan perintah penghukuman ('PH') terhadapnya pada 15 September 2006. Perintah penerimaan dan perintah penghukuman berbangkit daripada satu hutang penghakiman yang diperolehi oleh pemiutang penghakiman daripada Mahkamah Tinggi Kuala Lumpur dan menurut satu notis penghakiman yang dikeluarkan oleh pemiutang penghakiman. Alasan-alasan rayuan adalah: (i) hutang tersebut tidak dibuktikan pada pendengaran petisyen di hadapan PKP, penghutang penghakiman telah menyampaikan satu notis di bawah k 117 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah tersebut') mempertikaikan keberhutangannya dan perbuatan kebankrapan; (ii) Perintah penghukuman tersebut tidak sepatutnya diberikan sebaik sahaja pemberian perintah penerimaan. PKP tersebut mesti mengambil langkah lanjut untuk bertanyakan sama ada penghutang mempunyai sebarang harta ataupun sanggup menawarkan pampasan. Pemiutang penghakiman menentang atas alasan, tiada keperluan untuk memberikan bukti hutang tambahan pada pendengaran petisyen di hadapan PKP disebabkan s 6(2) Akta Kebankrapan 1962 ('Akta tersebut') hanya menyatakan bahawa pada pendengaran semestinya wujud bukti hutang dan bukannya bukti hutang pada tarikh pendengaran.

Diputuskan, menolak rayuan dengan kos:

(1) Adalah wajib bagi penolong kanan pendaftar untuk memerlukan bukti hutang yang dihutang dan perbuatan kebankrapan. Ini jelas dinyatakan di s 6 Akta tersebut (lihat perenggan 7).

(2) Adalah penting untuk meneliti bahawa di bawah s 6(5) Akta tersebut, sekiranya penghutang menghadirkan diri di petisyen, beliau dikehendaki menafikan keberhutangannya sebelum PKP dapat menggantungkan semua

prosiding untuk suatu tempoh yang munasabah untuk perbicaraan atas soal berhubungan dengan hutang tersebut. Di sini apa yang penghutang penghakiman lakukan ialah memfailkan notis di bawah kaedah 117 Kaedah tersebut untuk menentang petisyen pemiutang dengan menyatakan bahawa beliau mempertikaikan hutang dan perbuatan kebankrapan tersebut tanpa butir-butir terperinci. Satu penghakiman mahkamah bagi semua niat dan tujuan adalah muktamad tentang keberhutangan yang dihutang kepada pemiutang penghakiman. Dengan ini, tanpa bukti bahawa jumlah-jumlah tersebut tidak dihutang PKP berhak tidak menggantungkan prosiding tersebut di bawah s 6(5) (lihat perenggan 8).

(3) Hakim menerima hujahan peguamcara pemiutang penghakiman bahawa bukti hutang telahpun dibekalkan melalui notis kebankrapan yang merujuk kepada penghakiman yang diperolehi daripada mahkamah (lihat perenggan 10).

(4) Berhubungan dengan afidavit yang menentusahkan petisyen sepatutnya dilampirkan dengan petisyen pemiutang, hakim tidak bersetuju dengan penghakiman Edgar Joseph Jr J di kes *Ooi Thean Chuan v Banque Nationals de Paris* [1992] 2 MLJ 526. Ia adalah substans dan bukan bentuk yang penting. Tujuan Borang 11 hanya memberikan notis penghutang penghakiman bahawa afidavit yang ditentusahkan telah dilampirkan kepada petisyen. Sekiranya afidavit yang menentusahkan petisyen dan petisyen telah dibawa kepada notis penghutang penghakiman, maka tujuan tersebut telah dicapai. Sesuatu perlanggaran peraturan yang kecil (walaupun dibuktikan) tidak bermakna dalam kes ini menjadikan petisyen tidak berkuat kuasa dan salah (lihat perenggan 11).]

Notes

For cases on dispute as to sum owed, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2308.

For cases on validity of creditor's petition, see 1*Mallal's Digest* (4th Ed, 2005 Reissue) paras 2807–2829.

Cases referred to

A Debtor, Re (591 of 1934) [1935] Ch 353 (refd)

Asia Cemmercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Mat Shah bin Safuan, Re; ex p United Asian Bank Bhd [1991] 2 MLJ 48 (refd)

Ooi Thean Chuan v Banque Nationale de Paris [1992] 2 MLJ 526 (refd)

Tan Sri Kishu Tirathrai, Re; ex parte Affin Bank Bhd [2007] 2 MLJ 53 (refd)

Sharma Kumari Shukla, Re; ex parte Dato Abdullah Hishan bin Haji Mohd Hashim (No 2) [2000] 6 MLJ 391 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(i), 6, 24
Bankruptcy Rules 1969 r 117
Rules of the High Court 1980 O 56 r 1(3A)

R Tharmy (Shook Lin & Bok) for the judgment creditor.
T Gunaseelan (Gunaseelan & Associates) for the judgment debtor.

Kang Hwee Gee J:

[1] This is an appeal by the judgment debtor against the decision of the SAR in making a receiving order ('RO') and adjudication order ('AO') against her on 15 September 2006.

[2] The receiving order and adjudication order arose from a judgment debt of RM10,225,753.42 obtained by the judgment creditor from the High Court Kuala Lumpur and pursuant to a judgment notice issued by the judgment creditor.

[3] The grounds of appeal are as follows:

(1) The debt had not been proven at the hearing of the petition before the SAR, the judgment debtor having served a notice under r 117 disputing the debt and the act of bankruptcy.

(see bankruptcy notice *Re Tan Sri Kishu Tirathrai; ex p Affin Bank Bhd* (unreported) per Abdul Alim Abdullah JC of Kuala Lumpur High Court).

> The ground advanced by counsel for the judgment debtor is seen in some compelling and well founded authorities. It is well reasoned where seen in*Re Teoh Thean Peng, Ex Parte D & C Leasing Sdn Bhd* [1993] 1 AMR 20 where Dato' KC Vohrah J (as he then was) drew attention that the affidavit of verification on which the petition is filed cannot be used upon the hearing of the bankruptcy petition. This observation is self explanatory and one based on established English authorities which laws, namely the Bankruptcy Act 1952 (now replaced by the Insolvency Act 1986), and our Bankruptcy Act 1967 is in pari materia, the latter modeled on the former. Our Malaysian case law cited herein finds support in the English authority of *Re A Debtor (7 of 1910)* [1910] 2 KB 59 where Vaughan Williams LJ in stating that the affidavit is in effect for the purpose of getting leave to file the petition in bankruptcy, went on to say:
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> The affidavit which was used at the time when the petition was filed was an affidavit which cannot be used upon the hearing of the bankruptcy petition.
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> A very relevant passage from Williams and Muir Hunter on *The Law And Practice In Bankruptcy* (19th Ed) at p 56 will make plain and illuminate the essential point in the proof of debt of the petitioning creditor:
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> Since bankruptcy affects not only the debtor and his creditors, but also the general public, the court has a duty to see that all the requirements of the Act and Rules have been observed *Re a Debtor (591 of 1934)* [1935] Ch 353. The petitioning creditor's debt must be proved not only to have existed at the date of the act of bankruptcy and at the time of the presentation of the petition, but also to exist at the hearing and down to the making of the receiving order.

Submits: The debt ought to be proved right up to the time the receiving order is made as certain sums may have been made to the judgment creditor before the hearing. We have given notice that we dispute an act of bankruptcy.

[4] The adjudication order should not have been made as was done in this case, immediately after the receiving order was made. The SAR must take a further step

of asking whether the debtor has properties or compensation can be offered (see observation of Abdul Alim Abdullah JC in *Re Tan Sri Kishu Tirathrai; ex parte Affin Bank Berhad* [2007] 2 MLJ 53).

[5] The judgment creditor opposed this appeal on the following grounds:

(1) The judgment debtor is incompetent to raise the issues that he has raised just now as during the hearing before the SAR he had only raised one technical issue on the failure of the judgment creditor to attach the affidavit verifying petition with the creditor's petition. As such the judgment debtor is now estopped from raising any other issues (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189) per Peh Swee Chin SCJ at Held (2):

> There are two kinds of estoppel per rem judicatum, ie cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

See also O 56 r 1(3A) of the Rules of the High Court 1980:

> (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the judge is satisfied that:
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> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
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> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

(2) It is not necessary to provide any additional proof of debt at the hearing of the petition before the SAR as s 6(2) Bankruptcy Act 1967 merely says at the hearing there should be proof of the debt as opposed to proof of debt at the date of hearing. Proof of debt had already been provided by the affidavit verifying petition also by the fact of the judgment (see *Re Sharma Kumari Shukla; ex p Dato' Abdullah Hishan bin Haji Mohd Hashim (No 2)* [2000] 6 MLJ 391 at Held (1):

> The judgment which forms the basis of the bankruptcy proceeding is proof of the debt. The act of bankruptcy was committed on 27 December 1999 when the court dismissed the affidavit to set aside the bankruptcy notice. The service of the petition was sufficiently proven by referring to the affidavit of service (encl 36). As such, there was sufficient proof to satisfy the requirement of s 6(2) of the Act (see p 394B-C). Rule 120 refers to instances where the petition is dismissed due to non-appearance of the creditors. In the present case, the petitioner was represented by his counsel (see p 396B).

(3) In the petition before the Senior Assistant Registar we had, before the judgment, filed in a supplementary affidavit to say that the affidavit verifying the petition had been stapled to the creditor's petition and served on the judgment debtor.

(4) On the issue of whether the adjudication order should be made only after the court asked the judgment debtor whether she has any properties and secondly whether she can offer any composition to the judgment creditor (see s 24 of the Bankruptcy Act 1967 which reads as follows:

Adjudication of bankruptcy

24. (1) At the time of making a receiving order the court shall adjudge the debtor bankrupt unless the debtor can show to the satisfaction of the court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors; provided that when a receiving order is made against a firm in the firm's name the court shall not adjudge any person bankrupt as a member of the firm unless such person is proved to the satisfaction of the court to be a partner by his own admission or by evidence on oath.

(2) The court may at any time, on the application of the debtor himself, by petition in writing, unstamped, to be forthwith filed, adjudge him bankrupt and at the same time make a receiving order against him, and such application may be made without notice.

(3) Where a receiving order is made against a debtor, if the creditors at the first meeting or any adjournment thereof resolve by ordinary resolution that the debtor be adjudged bankrupt or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of this Act within fourteen days after the conclusion of the examination of the debtor or such further time as the court allows, the court shall adjudge the debtor bankrupt.

(4) When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee.

(5) Notice of every order adjudging a debtor bankrupt, stating the name, address and description of the bankrupt and the date of the adjudication, shall be published in the Gazette and advertised in a local paper as prescribed, and the date of the order shall for the purposes of this Act be the date of the adjudication.

Submits:

Onus is on the judgment debtor to inform the court at the hearing that she can make a composition with her creditor or creditors. In our case the judgment debtor did not provide any such information that she has the means to settle. In her notice of intention to oppose the petition under r 117 of the Bankruptcy Rules 1969 she merely disputes the debt and the act of bankruptcy without condescending to particulars (see *Re Mat Shah bin Safuan, ex p United Asian Bank Bhd* [1991] 2 MLJ 48 per Siti Norma Yaakob J (as she then was) at p 50:

Coming to the petition itself, the debtor contends that the court is only empowered to make a receiving order pursuant to the prayer contained in the first paragraph of the petition and also pursuant to s 6(2) of the Act. Consequent upon such an order, a general meeting of creditors will be held under s 15(1) of the Act for the purpose of considering whether a proposal for a composition or scheme of arrangement shall

A be entertained and under r 150(2) once a resolution for the acceptance of the composition or arrangement has been passed by the creditors at the first meeting and before the holding of a subsequent meeting to confirm the resolution, the debtor informs the Official Assignee in writing that he is unable to carry out the proposed composition or scheme or if at the subsequent meeting the proposed composition or scheme is not confirmed, the Official Assignee shall apply to the court to adjudicate B the debtor a bankrupt and the court may so adjudge him without any further notice to him. In view of the specific provisions in the Act and the rules, the debtor contends that he must be given the chance to submit a proposal for the composition or scheme of arrangement to his creditors before the court is empowered to adjudge him a bankrupt.

C Under s 6(2) of the Act, once the debt of the petitioning creditor and the act or acts of bankruptcy complained of have been proved to the satisfaction of the court, a receiving order will be made in pursuance to the petition. In this case all the requirements have been fulfilled and pursuant to para 1 of the petition, I am empowered to make a receiving order against the debtor. Under r 150(1) when a receiving order has been made, any creditor or the Official Assignee may apply to the D court to adjudge the debtor bankrupt. In this case the judgment creditor orally applied to have the debtor adjudged a bankrupt and I had in deference to the debtor's objection adjudged him so as s 15(1) and r 150(2) do not prohibit me from making such an adjudication order. These provisions merely set out the procedures to be followed after a receiving order has been made and they are merely the administrative acts of the Official Assignee and have nothing to do with the jurisdiction of the court E to adjudicate a debtor a bankrupt under r 150(1) of the oral application of the judgment creditor, following the making of a receiving order on him.

[6] Adjudication order means merely a declaration of bankruptcy will be vested on the RO upon adjudication order made.

F REPLY BY COUNSEL FOR THE JUDGMENT DEBTOR

(1) Res judicata does not apply because it is in the same proceeding and this is an issue of law raised and appealed.

(2) In bankruptcy proceeding even at the hearing of the creditor's petition the G court has the power to go behind the judgment.

(3) The law is clear that proof of the debt as at the date of the receiving order.

(4) Affidavit filed in the course of submission must be discarded.

H FINDINGS AND DECISION

[7] I agree entirely with the submision of counsel for the appellant that it is incumbent upon the SAR to require proof of the debt owed and of the act of bankruptcy. This is set up clearly in s 6of the Bankruptcy Act 1967 of the which reads as follows:

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6. Proceedings and order on creditor's petition

(1) A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts and shall be served as prescribed.

(2) At the hearing the court shall require proof of

(a) the debt of the petitioning creditor; and

(b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, some one of the alleged acts of bankruptcy; and

(c) if the debtor does not appear, the service of the petition,

and if, satisfied with the proof may make a receiving order in pursuance of the petition.

(3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

(4) When the act of bankruptcy relied on is noncompliance with a bankruptcy notice to pay, secure or compound for a judgment debt, the court may if it thinks fit stay or dismiss the petition on the ground that an appeal is pending from the judgment.

(5) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security, if any, being given as the court may require for payment to the petitioner of any debt which may be established against the debtor in due course of law and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

(6) Where proceedings are stayed the court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.

(7) A creditor's petition shall not after presentation be withdrawn.

[8] It is pertinent to note that under sub-s (5) if the debtor appears at the petition, he is required to deny the indebtedness before the SAR could act to stay all proceedings for such time as may be required for trial of the question relating to the debt. In the proceedings before the SAR it is clear that all the judgment debtor did was to submit the notice under r 117 to oppose the creditor's petition by stating therein that she was disputing the debt and the act of bankruptcy without condescending to any particulars. The act of bankruptcy it is to be noted had been brought about under s 3(1)(i) of the Act on account of the judgment debtor failing to satisfy the bankruptcy notice on the judgment debt that the creditor had obtained from a court of law. A judgment of the court for all intent and purposes is conclusive of the debt owed to the judgment creditor. It follows that in the absence of any evidence that those sums were not owed the SAR was entitled not to stay the proceeding under s 6(5). She was entitled to find that the sum of RM10,225.753.42 was due and owing by the judgment debtor and that by the judgment debtor's failure to satisfy the bankruptcy notice after the expiry of seven days, an act of bankruptcy had been committed by the judgment debtor.

[9] Having found that an act of bankruptcy had been committed, the SAR was entitled to make the receiving order and the adjudicating order as she had done. I would accept as authority the judgment of Siti Norma Yaakob cited by counsel as good law.

[10] I accept the submission by counsel for the judgment creditor that the proof of debt had been provided by the bankruptcy notice itself which alluded to the judgment obtained from the court.

[11] With respect to the contention of counsel for the judgment debtor that the affidavit verifying the petition must be annexed with the creditor's petition, I would respectfully disagree with the judgment of Edgar Joseph Jr J in *Ooi Thean Chuan v Banque Nationals de Paris* [1992] 2 MLJ 526. In my view it is the substance not the form that matters. The purpose of Form 11 was merely to bring to the notice of the judgment debtor that the verifying affidavit had been annexed to the petition. If indeed the verifying affidavit and the petition had been brought to the notice of the judgment debtor that purpose had been achieved. A minor infraction (even if proven) does not in this case make the petition ineffective and bad. The appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Sally Kee